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THE ACTION FOR THE MALICIOUS PROSECUTION OF
A CIVIL SUIT.

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I. *Introduction*.—Actions for the malicious prosecution of persons on criminal charges are familiar to both judges and lawyers. To put the criminal law in force, maliciously and without probable cause, is a wrongful act, and he who is thereby injured in person, property or reputation, may obtain satisfaction from his injurer before a civil tribunal. The courts offer to the vindictive and malevolent an easy yet terrible engine with which to carry out the promptings of their malice. While within their precincts the accused is not to be regarded as guilty until proved so, yet outside their walls the rule is different, and to be charged with a crime, so far as the reputation is concerned, is almost as bad as to be convicted of it. Therefore to charge a citizen with the commission of a criminal act, and to do so groundlessly and mali-

ciously, is a grievous wrong ; therefore the reports teem with cases in which persons unjustly accused have successfully appealed to the courts for damages against their traducers. Other instances of oppression through the aid of the law, less frequent but equally clear, present themselves. The maliciously attempting to have one adjudicated a bankrupt (*Farley v Danks*, 4 El. & Bl. 499), or adjudged a lunatic (*Lockenour v. Sides*, 57 Ind. 360), maliciously arresting another in a civil action (*Stone v. Swift*, 4 Pick. 389 ; *Hayden v. Shed*, 11 Mass. 500), falsely suing out an attachment against a person's property (*Fortman v. Rottier*, 8 Ohio St. 548), or maliciously issuing execution for a larger sum than is due (*Churchill v. Siggers*, 3 El. & Bl. 938), are examples of legal damage resulting from the wrongful exercise of legal remedies other than criminal. In four of the five cases above instanced, there is no deprivation of the plaintiff's liberty, and even in the fifth the proceeding is in no sense in the nature of a prosecution for a crime. It is thus evident that to sustain an action for a malicious prosecution, it is not essential that the proceeding which is complained of should have been a criminal one, or that the plaintiff should have been imprisoned. In the malicious attempts to adjudicate him a bankrupt or adjudge him a lunatic, his damage lies in the injury to his reputation, and the expense to which he has been put in resisting the proceedings ; in the malicious attachment of his person, there is little or no injury to the reputation, but there may have been much expense in procuring bail, and in the two last cases the damages sustained are principally his costs in seeking advice and obtaining bondsmen.

Nevertheless, in all the cases above mentioned, the defendant suffers damage in his property over and above the ordinary costs of resisting a civil action ; and the question, will an action lie for maliciously and vexatiously prosecuting a civil suit against another where no special damage is incurred, presents itself for our consideration.

II. *Restraints on vexatious litigation in England.*—It has long been a leading principle of the English law to accord to every man the utmost liberty of bringing his grievances before the tribunals of his country ; “a man shall not be punished for suing on writs in the king's courts, whether he have right or wrong :” Fitzherbert's Nat. Brev. 429. But though the right to

sue is encouraged and not restricted, appliances for the suppression of vexatious and unfounded litigations have existed in the English courts from early times. Prior to the reign of Henry III. no person could maintain a civil action without having two or more persons as pledges of prosecution; and if judgment were given against the plaintiff, or if he deserted his suit, both he and his pledges were amerced to the king. A failure to find pledges was a sufficient ground for reversing a judgment on a writ of error. But this system at length fell into abuse, partly from the fact that, as they went to the king the injured party himself received no benefit from the amercements, and partly because it was abused by plaintiffs supplying, as pledges, persons of mean estate, or even imaginary persons: *Hussey v. Moore*, 3 Bulstr. 275; *Law Magazine and Review*, September 1876. Then about the middle of the thirteenth century, Parliament decreed that the successful party should in all cases receive his costs, which principle obtains in the English courts to this day.

III. *The action for maliciously prosecuting a civil suit.—Views of the old judges.*—And so, because the defendant was considered to be sufficiently recompensed, and the plaintiff sufficiently punished, by respectively receiving and paying the costs of the unfounded suit, the old cases and the early text writers all concur in denying the right to a civil action in addition. Thus, in Bacon's Abridgment, tit. *Action on the Case* (H), p. 141, it is said: "But it must be observed that there is a great difference between a false and malicious prosecution by way of indictment and bringing a civil action; for in the latter the plaintiff asserts a right and shall be amerced *pro falso clamore*; also, the defendant is entitled to his costs; and, therefore, for commencing such an action, though without sufficient cause, no action on the case lies." In Buller's *Nisi Prius*, p. 11, it is said: "In general it is not actionable to bring a civil action, though there be no good ground for it, because it is a claim of right, and the plaintiff finds pledge to prosecute, and is amerciable *pro falso clamore*, and is liable to costs." *Waterer v. Freeman*, Hobart 205, 266, arose in 1640. It was an action for wrongfully suing out double executions against the plaintiff's property, whereby he was twice charged. The action was sustained, HOBART, C. J., in the course of his judgment, saying: "If a man sue me in a proper court, yet, if his suit be utterly without ground of truth, and that certainly known

to himself, I may have an action of the case against him for the *undue vexation and damage* that he putteth me unto by his ill practice, though the suit itself be legal, and I cannot complain of it as it is a suit." Fifty years later we find another case meagerly reported, and far from clear (*Temple v. Killingworth*, 12 Mod. 4 (1691), the whole report being embraced in the two sentences of the judgment of HOLT, C. J.: "Of late it is held that case will lie for *prosecution* in an inferior court where that court has not the jurisdiction. The first case in point was at Huntingdon assizes, and referred to the Common Pleas, and there adjudged that to sue a man, without any cause of action at all, no action lies, unless it appears to be with a malicious and vexatious design." But from a report of the same case in Shower's Reports 158, it appears that the plaintiff had been arrested; and it is to be observed that in the latter report no mention is made by Lord HOLT of the case at the Huntingdon assizes, neither is it in Carthew 189, where *Temple v. Killingworth* is also reported. *Savill v. Roberts*, 12 Mod. 208, decided in the King's Bench in 1698, is a much cited case in this connection. The defendant had indicted the plaintiff for riot; the latter was acquitted, whereupon he brought an action for damages to his name and property, which was sustained. HOLT, C. J., who delivered the judgment of the court, replied to the defendant's argument that no man should be responsible for any damages for suing a writ or prosecuting in the king's courts. "It is to be considered," said he, "first, that there is a great difference between bringing an action maliciously, and prosecuting an indictment maliciously; and secondly, that the notion that no action doth lie for bringing an action maliciously is not to be taken largely and universally but with some restrictions; for, first, if a man brings an action, he either claims a right or complains of an injury, and the law always allows him to take his course of law to obtain his right or be satisfied for his injury, and this is allowed in all courts. * * * The law hath provided that no man should prosecute without finding pledges, and that was a security against troublesome actions; then if the plaintiff's suit be vexatious and groundless, he shall be amerced *pro falso clamore*, and though these amercements be now matters of form, and therefore several Acts of Parliament have given costs to defendants, yet, we must judge by the reason of the law as it stood anciently; but in case of an indictment, there is no provision or remedy, but

by bringing an action; but if it appears that the action is brought merely for vexation and oppression, the party grieved, *in some cases*, shall have action on the case; he shall not, indeed, say generally, that he falsely and maliciously, without probable cause, did bring an action, &c., but if he show any special matter whereby it appears to the court that it was frivolous and vexatious, he shall have an action, as in the case of *Daw v. Swaine*, 1 Sid. 424." In *Parker v. Langley*, Gilbert's Cas. 163, decided in 1714, PARKER, C. J., said: "The applying in a civil action to a court of justice for satisfaction or redress has been so much favored, that no action has ever been allowed against a plaintiff for such suit singly and directly on pretence of its being false and malicious. * * * An action upon the case has not yet succeeded (whatever in special cases they must do), but only where the plaintiff in the first suit made the course of the court, requiring special bail, a pretence for detaining another in prison, and where the malice was so specially charged that it appeared that the end of the arrest was not the expectation of benefit to himself by a recovery, but a design of imprisoning the other." In 1766, Lord CAMDEN said that there were no cases to be found in the old books of actions for suing where the plaintiff had no cause of action, but that "of late years when a man is maliciously held to bail where nothing is owing, or where he is maliciously arrested for a great deal more than is due, this action has been held to lie because the costs in the cause are not a sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due:" *Gostlin v. Wilcock*, 2 Wils. 305 (1766).

IV. *The principle followed in late years.*—The modern English decisions reiterate the conclusions of the older cases without dissent. In the year 1851, while arguing a case before the full bench of the Common Pleas, the plaintiff's counsel asked: "Actions for malicious prosecution of criminal charges are of frequent occurrence—upon what principle is it that that sort of action is maintainable? Because the process of the queen's court is made use of for the purpose of oppression. What difference is there in this respect between process of a criminal and process of a civil court?" To this JERVIS, C. J., replied: "Where an action is wrongfully brought, the costs which the party gets are a compensation for the wrong; but in criminal proceedings there are no costs." The counsel then cited from Fitzherbert's *Natura*

Brevium, 116 *b*, where it is said that "if men say and affirm unto A. that he hath right unto such land and procure and cause him to sue an action for the same against B., who is tenant of that land, &c., by which he is of necessity compelled to sell other lands or tenements for the defence of his land, &c., now he shall have an action against those who procure or conspire to cause A. to bring his action." But WILLIAMS, J., answered: "That may be, though it is not so put, on the ground that no costs were recoverable in a real action:" *Cotterell v. Jones*, 11 C. B. 715 (1851). In this case the action was against two persons for conspiring together maliciously and vexatiously to commence an unfounded action against the plaintiff in the name of a third, a pauper, and in pursuance thereof so commencing and prosecuting it, whereby, although the pauper was nonsuited, the plaintiff was unable to obtain his costs against him. The plaintiff had a verdict for the amount of the costs incurred by him in the former action, but on appeal the judgment was set aside on a question of pleading, the court holding that the declaration did not show a cause of action, because it did not allege that on the nonsuit the costs had been awarded by the court against the pauper. Nevertheless the language of the judges must be noticed in examining our subject. "It is conceded," said JERVIS, C. J., "that if the party so wrongfully put forward as plaintiff in the former action had been a person in solvent circumstances, this action could not have been maintained, inasmuch as the award of costs to the defendant (the now plaintiff) upon the failure of that action, would in contemplation of law, have been a full compensation to him for the unjust vexation, and consequently he would have sustained no damage." MAULE, J., said: "It is conceded that this action could not be maintained in respect of extra costs, that is, *costs ultra, the costs given by statute to a successful defendant.*" And TALFOURD, J., added: "It appears from the whole current of authorities that an action of this description, if maintainable at all, is only maintainable in respect of legal damage actually sustained; and that the mere expenditure of money by the plaintiff in the defence of the action brought against him does not constitute such legal damage; but that the only measure of damage is the costs ascertained by the usual course of law. There being no averment in this declaration that any such costs were incurred or awarded, no legal ground is disclosed for the maintenance of the action."

Purton v. Honnor, 1 Bos. & Pul. 205 (1798), was an action on the case to recover damages sustained by the plaintiff in defending a vexatious ejectment suit brought against him by the defendant in which the nominal plaintiff had been *non prossed*. There was a general demurrer to the declaration and joinder. The case came on before the Common Pleas on a day set for the purpose of hearing the plaintiff's counsel in support of the declaration, but the court expressing themselves as being clearly of opinion on the authority of *Seville v. Roberts*, *supra*, that such an action was not maintainable, he declined arguing the point, and the court gave judgment for the defendant.

V. *Opinions of the American text writers.*—In Swift's Digest published in 1849, Dutton & Cowdry's ed., p. 492, it is said: "It is well settled that at common law no action will lie against one for bringing a civil suit, however malicious and unfounded, unless the body of the party is imprisoned or holden to bail. In all other cases the costs the party recovers is supposed to be an adequate compensation for the damage which he sustains. Of course where the process is by summons only, there can be no action for a malicious suit; it can only lie in cases where the process is by attachment, for there no cost is allowed which can be a compensation for the personal injury. Whenever one person causes another to be arrested or attached and holden to bail, or imprisoned, where there is no debt due, or for a greater sum than is due, with a malicious intent to injure and oppress him, action will lie." The editors of the American Leading Cases, vol. 1, p. 261, in their note to *Munns v. Dupont*, 3 Wash. C. Ct. 31 (1811), unqualifiedly lay it down that the action of malicious prosecution will not lie for the mere institution of a civil suit in a court of competent jurisdiction, where the person is not arrested or held to bail, or his property attached, or other grievance occasioned, because the costs are considered a sufficient compensation. The cases, they say, where the general principle has been asserted that an action will lie for any civil suit maliciously and groundlessly instituted, were not cases of malicious prosecution but of malicious abuse of the process of law; and further on, the cases in which an action for malicious abuse of process is sustainable are stated to be five, viz.: where a *capias* is sued out for some collateral object of oppression; where a second *capias* is issued from vexatious

motives; where a *ca. sa.* is sued out irregularly, a *fi. fa.* being still out; where, under a *fi. fa.* on a judgment on a bond with penalty, the plaintiff directs goods to be levied on and sold to the amount of the penalty, or in double the amount of the debt due on it; and where the defendant is arrested on a *ca. sa.* for a larger sum than is due. The case of an ordinary suit without these collateral or extraordinary features, is not included in this category. In Weeks's *Damnum Absque Injuria*, sect. 70, it is said: "If a person prosecutes a civil action against another maliciously, and without reasonable and probable cause, no action for damages can usually be supported against the prosecutor. A man may, if he fancies he has a civil action against another, prosecute his claim, however false or unfounded it may be. The rules governing malicious prosecutions in the criminal courts do not apply. It cannot, however, be denied that in cases of extremely vexatious suits, where special damage has been actually suffered, alleged and shown, the action has been allowed." In Cooley on Torts, p. 189, it is said: "If every suit may be retried on an allegation of malice the evils would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first." Mr. Townshend, in his essay on Malicious Prosecution (Townshend on Slander and Libel, sect. 410), says: "Ordinarily a civil action involves the defendant merely in the costs of his defence, and in civil actions, with rare exceptions, the award of costs to the defendant is the only penalty to which the plaintiff is subjected for having made an unfounded complaint. But where in a civil action the defendant is held to bail or imprisoned, he has, under certain circumstances, a remedy by action, and such an action is usually denominated an action for malicious prosecution. Without insisting that this is improper, we exclude such actions from our consideration, and confine ourselves exclusively to the action for making a criminal charge maliciously and without reasonable and probable cause." In the American edition of Addison on Torts, sect. 863, it is said: "If one man prosecutes a civil action against another maliciously and without reasonable and probable cause, an action for damages is not maintainable against the prosecutor of the action. There is a great difference between the bringing of an action and indicting maliciously and without cause. Where a man brings an action he claims a right to himself or complains of an injury done to him; and if a man fancies he has a cause of action he may sue and put

forward his claim, however false and unfounded it may be. The common law, in order to hinder malicious and frivolous and vexatious suits, provided that every plaintiff should find pledges which were amerced if the claim were false. But that method became disused, and then to supply it the statutes gave costs to the successful defendants. But there was no amercement upon indictments, and the party had not any remedy to reimburse himself but by action. But if A. sues an action against B. for mere vexation, in some cases, upon particular damage, B. may have an action, but it is not enough to say that A. sued him *false et malitrose*, but he must show the matter of the grievance specially, so that it may appear to the court to be manifestly malicious." In Hilliard on Torts, p. 422, it is said: "It has been sometimes held that an action for a malicious prosecution will not lie for bringing a *civil suit*, although it were groundless. * * * The explanation of this difference between criminal prosecutions and civil actions is found in part in the fact that the common law in order to hinder malicious, frivolous and vexatious suits, provided that every plaintiff should find pledges which were amerced if the claim was false. And after this practice ceased statutes provided costs for a prevailing defendant. But the qualified doctrine is now well settled in relation to civil actions, corresponding with the rule as to criminal prosecutions, that no action lies to recover damages sustained by being sued in a civil action, unless it was malicious and without probable cause: *Baugh v. Killingworth*, 4 Mod. 14 (1690); *White v. Dingley*, 4 Mass. 433 (1808); *Cox v. Taylor*, 10 B. Mon. 17 (1849); *Wengert v. Beashore*, 1 Penn. St. 232 (1830); *Herman v. Brookerhoof*, 8 Watts 240 (1839); *Jamison v. McIntosh*, 12 La. Ann. 785 (1857); *Besson v. Southard*, 10 N. Y. 236 (1851). Of the cases cited by Mr. Hilliard not a single one sustains the proposition that an ordinary civil suit, where there has been no arrest of the person or no taking of property out of the possession or disposal of the defendant by attachment or injunction, may become the subject of another action if prosecuted maliciously and without probable cause. In *Baugh v. Killingworth*, *Wengert v. Beashore*, *Herman v. Brookerhoof* and *Besson v. Southard*, the plaintiff had been arrested by the defendant under a *capias* in the former suit. *White v. Dingley* involved no different principle. The creditors of White had by deed covenanted with him that they would not sue or arrest him for any demands due by him to them

for the space of two years, the deed further providing that if any creditor should bring suit, &c., in violation of the agreement, the said White should be wholly discharged as to all claims held by the creditor or creditors so suing. Dingley, a creditor, who had signed the agreement, sued the plaintiff before the two years had expired, and in default of bail he was committed to prison. It was held that he was not entitled to an action in addition to the discharge from the debt which he owed; that the forfeiture of the debt was in the nature of liquidated damages. It is true that the chief justice, in concluding his opinion, remarked: "No action by the common law lies for damages sustained by suing a civil action when the plaintiff fails, unless it be alleged and shown to be malicious and without probable cause." But as the case which he was deciding grew out of both a suit and an arrest, it cannot be presumed that he was referring to an action in which but one of these was present. In *Cox v. Taylor* the plaintiff had sued out an injunction under which the plaintiff had been kept out of the use of his land for upwards of twelve years; and in *Jamison v. McIntosh*, also, the complaint was the wrongful suing out of an injunction.

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(To be continued.)

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

CHARLES I. BONAPARTE, EXECUTOR OF ELIZABETH PATTERSON,
PLAINTIFF IN ERROR, v. THE APPEAL TAX COURT OF BALTI-
MORE CITY, DEFENDANT IN ERROR.

The registered public debt of one state, or of a city, town or county in such state, though exempted from taxation under the laws of said state, or actually taxed in such state, are taxable by another state, when actually owned by a resident of the latter state.

IN error to the Court of Appeals of Maryland.

The following registered evidences of debt, belonging to the testatrix of the plaintiff in error, were valued to her in 1876, in her lifetime, in the city of Baltimore, where she resided, under the laws of Maryland: \$105,000 City of New York 6 per cent. stock; \$15,000 City of New York 7 per cent. stock; \$10,000 County of